

No. 24-1606

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY FERRELL FOUNDATION, INC., *et al.*,

Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLEES

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review this interlocutory appeal of the district court's order denying Plaintiffs' various motions for preliminary injunction under 28 U.S.C. § 1292(a)(1). The district court issued that order on January 18, 2024, and Plaintiffs filed their notice of appeal on March 17, 2024, within the 60-day period for seeking review pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B).

This Court does not have jurisdiction to review Plaintiffs' interlocutory appeal of the district court's order granting in part and denying in part the Government's motion to dismiss. No final judgment has issued in this case, and litigation is ongoing in the district court.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in denying Plaintiffs' various requests for preliminary injunction.
2. Whether this Court can exercise pendent jurisdiction over the district court's order granting in part and denying in part Defendants' motion to dismiss.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the supplemental addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

Congress passed the President John F. Kennedy Assassination Records Collection Act (Act) in 1992 to ensure the orderly collection and public dissemination of government records relating to the assassination of President Kennedy. The Act reflects Congress's determination that the government's records related to the assassination of President Kennedy "should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination." President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, § 2(a)(2), 106 Stat. 3443, 3443 (codified at 44 U.S.C. § 2107 note), Suppl. Addendum (SA) 2. To that end, the Act creates a "comprehensive legislative scheme" by which relevant government records would be identified, cataloged, and eventually disclosed to the public. *Assassination Archives & Research Ctr. v. Department of Justice*, 43 F.3d 1542, 1543 (D.C. Cir. 1995) (quotation marks omitted).

The Act directed every agency to, "[a]s soon as practicable after the date of enactment," conduct a search of its records to identify "records relating to the assassination of President John F. Kennedy." Act § 5(a), 106 Stat. at 3446; SA4. By default, the agency must then transmit any such record to the Archivist of the United States, *id.* § 5(e)(1), 106 Stat. at 3448; SA5, who then includes them in the "President John F. Kennedy Assassination Records Collection," *id.* § 4(a), 106 Stat. at 3445; SA3. Within 30 days of transmission to the Archivist, the Archivist is to ensure that all

records in the Collection are to be “available to the public for inspection and copying at the National Archives.” *Id.* § 4(b), 106 Stat. at 3446; SA3.

But the Act recognizes that immediate disclosure of some records would not be appropriate for various reasons and therefore creates a process by which an agency may postpone disclosure of records. Within 300 days of enactment, government agencies were to determine whether disclosure of any of their assassination records should be postponed. Act § 5(c)(2)(D)(i), 106 Stat. at 3447; SA4. Section 6 of the Act enumerates the various justifications that agencies could invoke to postpone release of records and established an independent Assassination Records Review Board (Board) to review and adjudicate those agency postponement decisions. The harms that could qualify a record for postponed disclosure by an agency include threats to the Nation’s military or defense operations or its foreign relations conduct; revealing the identity of a living person who provided confidential information to the United States; unwarranted invasions of personal privacy that outweigh the public interest; or disclosure of a security procedure utilized by an agency charged with protecting government officials. *Id.* § 6, 106 Stat. at 3449; SA6. The Board could authorize postponement only if, after reviewing an agency’s request, it found by clear and convincing evidence that one of those justifications existed. *Id.* §§ 6, 9(c), 106 Stat. at 3449, 3454-55; SA6; SA8-SA9.

If, after conducting its review, the Board approved an agency’s request to postpone disclosure of a record, the Act required the Board to create a public record

describing the document, providing a justification for its postponement, and recommending a specified time or specified occurrence following which the material may be appropriately disclosed to the public. Act § 9(c)(3), 106 Stat. at 3454-55; SA8-SA9. The Act also granted the President “sole and nondelegable” authority over the Board’s disclosure or postponement decisions regarding particular assassination records, meaning that the President could part ways with a “formal determination” by the Board and require either disclosure or postponement of a record (or part of it). *Id.* § 9(d), 106 Stat. at 3455; SA9-10.

Congress anticipated that this entire process would happen expeditiously, and that all assassination records would be identified, reviewed, and either disclosed or authorized for postponement by the Board within a few years of enactment: The Act provides that the Board would be in place for two years, with an option for a one-year extension. Act § 7(o), 106 Stat. at 3452-53; SA8. Once the Board terminates, “[t]he provisions of th[e] Act ... pertain[ing] to the appointment and operation of the Review Board shall cease to be effective.” *Id.* § 12(a), 106 Stat. at 3457; SA11. In 1994, Congress extended the term of the Review Board to 1996. *See* President John F. Kennedy Assassination Records Collection Extension Act of 1994, Pub. L. No. 103-345, § 2, 108 Stat. 3128, 3128 (codified at 44 U.S.C. § 2107 note). In 1997, Congress extended the Review Board’s term one final time, until September 30, 1998. *See* Act of July 3, 1997, Pub. L. No. 105-25, § 1(1), 111 Stat. 240, 240. The Review Board terminated in 1998, and the Act’s provisions related to the Board’s

appointment and operations have since been ineffective. Act § 12(a), 106 Stat. at 3457; SA11.

After that preliminary phase of rapid identification and disclosure or postponement, the Act lays out a process to ensure the eventual disclosure of all postponed records. Under that process, all records that were approved for postponement by the Board must undergo periodic review by the originating agency and the Archivist based on the recommendations provided by the Board in its postponement decision. Act § 5(g)(2)(A), 106 Stat. at 3448; SA5. If the Archivist and originating agency determine that continued postponement is necessary, the Act requires them to publish in the Federal Register an unclassified written description of why postponement remains necessary. *Id.* § 5(g)(2)(B), 106 Stat. at 3448; SA5. Otherwise, the record must be made available to the public.

But the Act also specifies an end point to that periodic review process: It provides that all assassination records, even those whose disclosure has continued to be postponed after periodic review, be “publicly disclosed in full, and available in the Collection no later than the date that is 25 years after the date of enactment,” *i.e.*, October 26, 2017. Act § 5(g)(2)(D), 106 Stat. at 3448; SA5. That mandate is not absolute, however: Section 5(g)(2)(D) allows for further postponement of records after the 25-year deadline for release. Unlike the periodic review process, which allows the Archivist and the originating agency to further postpone release, this final provision vests the President himself with sole authority to authorize further

postponement. To do so, the President must “certif[y], as required by this Act, that[] (i) continued postponement is made necessary by” identifiable harm to foreign relations or military, intelligence, or law enforcement operations and (ii) that harm identified “is of such gravity that it outweighs the public interest in disclosure.” *Id.* § 5(g)(2)(D), 106 Stat. at 3448-49; SA5. Other than setting forth these required criteria the President must find satisfied, the Act does not otherwise limit the President’s authority to postpone the 25-year deadline for disclosing all assassination records. *Id.*

B. Implementation of the Act

The Act has led to the addition of millions of pages and over 300,000 individual records to the Assassination Records Collection. *See* Board, *Final Report of the Assassination Records Review Board* (Sept. 1998), <https://perma.cc/F42P-DP7G>. From its inception in 1994 to its termination in 1998, the Board oversaw an exhaustive search for and review of undisclosed assassination records. *See generally id.* The Board processed over 60,000 assassination records for release, which included voting on more than 27,000 records whose disclosure agencies had sought to postpone. *Id.* at 38, 39 n.4.

Following the Board’s prescribed dissolution in 1998, *see* Act § 7(o)(1), 106 Stat. at 3452; SA8, the duties of the Archivist under the Act continued in effect, and will remain effective “until such time as the Archivist certifies to the President and the Congress that all assassination records have been made available to the public in

accordance with this Act,” *id.* § 12(b), 106 Stat. at 3458; SA11. Since 1998, agencies have continued to review and release records to the public, and the Collection now consists of approximately five million pages. *See* Nat’l Archives, *National Archives Releases New Group of JFK Assassination Documents* (Dec. 15, 2022), <https://perma.cc/QH6L-4LB3>.

C. Presidential Postponements of the Act’s 25-Year Deadline

As noted, Section 5 of the Act requires that all assassination records be publicly disclosed in full no later than 25 years after enactment of the Act (*i.e.*, by October 26, 2017), unless the President certifies that continued postponement is made necessary by an identifiable harm that outweighs the public interest in disclosure. Act § 5(g)(2)(D), 106 Stat. at 3448-49; SA5. Since October 2017, the President has certified four postponements of that 25-year deadline.

On October 26, 2017, then-President Trump issued a memorandum certifying that temporary continued postponement of certain limited assassination records was necessary to protect against harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations. *See* Temporary Certification for Certain Records Related to the Assassination of President John F. Kennedy, 82 Fed. Reg. 50,307 (Oct. 31, 2017). The President determined that such records should be temporarily withheld from public disclosure until no later than April 26, 2018, to allow sufficient time to determine whether such information warrants continued postponement under the Act. *Id.* During that review period, the government

disclosed additional information in over 45,000 assassination records. *See* Nat'l Archives, *JFK Assassination Records – 2018 Additional Documents Release*, <https://perma.cc/MB5H-B62J>.

On April 26, 2018, then-President Trump issued a second certification postponing the disclosure of certain records until October 2021, to allow time for further re-reviews. *See* Certification for Certain Records Related to the Assassination of President John F. Kennedy, 83 Fed. Reg. 19,157 (May 2, 2018). This re-review process was delayed, however, by the COVID-19 pandemic, which led to agencies requiring additional time to conduct their reviews.

Accordingly, on October 22, 2021, President Biden issued a memorandum certifying that continued postponement was necessary under Section 5(g)(2)(D) and extending the deadline for disclosure of all assassination records to December 15, 2022. *See* Temporary Certification Regarding Disclosure of Information in Certain Records Related to the Assassination of President John F. Kennedy, 86 Fed. Reg. 59,599 (Oct. 27, 2021) (October 2021 memorandum). The President directed that “[o]ver the next year, agencies proposing continued postponement[s] and [the National Archives and Records Administration (NARA)] shall conduct an intensive review of each remaining redaction to ensure that the United States Government maximizes transparency, disclosing all information in records concerning the assassination, except when the strongest possible reasons counsel otherwise.” *Id.* at 59,600.

On December 15, 2022, President Biden issued a second memorandum—the memorandum at issue in this appeal—regarding the disclosure of assassination records. *See* Certifications Regarding Disclosure of Information in Certain Records Related to the Assassination of President John F. Kennedy, 87 Fed. Reg. 77,967 (Dec. 20, 2022) (December 2022 memorandum); SA12-SA14. The memorandum noted that, per the October 2021 memorandum, federal agencies had undertaken a comprehensive review of the full set of almost 16,000 records that had previously been released only in redacted form. *Id.* at 77,967; SA12. The agencies determined that more than 70% of those records may be released in full. *Id.* President Biden directed that those records be released in full by December 15, 2022, and, on that date, NARA released new information in over 13,000 records. *See* Nat’l Archives, *JFK Assassination Records – 2022 Additional Documents Release*, <https://perma.cc/6SW5-KQJG>.

The December 2022 memorandum further noted that federal agencies, in the course of their review, “identified a limited number of records containing information for continued postponement of public disclosure.” 87 Fed. Reg. at 77,968; SA12. The President therefore certified those records for continued postponement of public disclosure under Section 5(g)(2)(D). *Id.*; SA13. Each agency also prepared a plan for the eventual release of that information—known as a “Transparency Plan”—to “ensure that information would continue to be disclosed over time as the identified harm associated with release of the information dissipates.” *Id.* at 77,969; SA14.

Each Transparency Plan “details the event-based or circumstance-based conditions that will trigger the public disclosure of currently postponed information by the National Declassification Center (NDC) at NARA.” *Id.*

Since the December 2022 memorandum issued, NARA has continued to review and release additional records under the criteria set forth by the President. Between April and June 2023, NARA released 2,672 documents containing newly disclosed information. *See* Nat’l Archives, *JFK Assassination Records – 2023 Additional Documents Release*, <https://www.archives.gov/research/jfk/release2023>.

D. Proceedings Below

On October 19, 2022, the Mary Ferrell Foundation (MFF), a nonprofit corporation that maintains a searchable electronic collection of President Kennedy assassination records, and two of its members filed a complaint against President Biden and NARA challenging the President’s October 22, 2021, memorandum. *See* ER-230. Plaintiffs amended their complaint in January 2023 to challenge the President’s December 2022 memorandum, *see* ER-234, and then again in April 2023, *see* ER-236. Plaintiffs also moved for a preliminary injunction in June 2023. *See* ER-239. Defendants opposed Plaintiffs’ motion and moved to dismiss. *See* ER-237, 239.

On July 14, 2023, the district court granted in part Defendants’ motion to dismiss Plaintiffs’ second amended complaint and denied Plaintiffs’ motion for a preliminary injunction. ER-118-134 (July 2023 opinion). The district court dismissed all of Plaintiffs’ claims against the President and most of Plaintiffs’ claims against

NARA, holding that the President’s postponement memoranda were issued consistent with the requirements of Section 5(g)(2)(D). *See* ER-121-133. The district court also held that the Act did not require NARA to undertake the various duties that Plaintiffs alleged and dismissed those claims, except to the extent Plaintiffs “challenge[d] NARA’s failure to maintain accurate reference aids and to release” legislative records.¹ ER-131.

The district court allowed Plaintiffs to file a third amended complaint in September 2023, in which Plaintiffs added three additional claims against NARA. ER-52-117 (third amended complaint). In addition, Plaintiffs filed three different motions for preliminary injunctions—one in October 2023 and two different motions on the same day in December 2023. *See* ER-242, 244. Two of those motions form the basis for this interlocutory appeal.² Defendants opposed Plaintiffs’ various requests for injunctive relief and moved to dismiss the new claims contained in the third amended complaint.

¹ Plaintiffs misleadingly characterize this as an “order granting” their claims on these issues. Br. 7-8. But the district court merely held that those claims survived Defendants’ motion to dismiss for failure to state a claim. *See* ER-129-131.

² Plaintiffs do not challenge (or even mention) the district court’s denial of their third motion, which sought an injunction requiring NARA publicly to disclose all legislative records that had been postponed by the President. The district court correctly denied that motion because it found Plaintiffs had not adequately demonstrated any irreparable harm. ER-14 (January 2024 opinion).

On January 18, 2024, the district court issued an order denying Plaintiffs' motions for injunctive relief. ER-4-14 (January 2024 opinion). First, as to Plaintiffs' request for an injunction setting aside the Biden memoranda and requiring NARA to conduct a re-review of the remaining redacted assassination record, the district court held that Plaintiffs were unlikely to succeed on the merits. The district court rejected Plaintiffs' theory that the President's authority under Section 5(g)(2)(D) is subject to various procedures and requirements contained elsewhere in the Act and explained that the President's authority to postpone records under Section 5(g)(2)(D) is an independent authority that does not incorporate requirements contained in other sections. *See* ER-8, 13. Second, the district court held that Plaintiffs were unlikely to succeed on the merits of their motion for an injunction instructing NARA to collect all allegedly remaining assassination records before the Archivist certifies that all assassination records have been made available to the public. The district court observed that the Act imposes duties to collect records only on the now-defunct Board, and does not impose an independent duty on NARA to take over all of the Board's duties. ER-14.

SUMMARY OF ARGUMENT

In this appeal from the district court's denial of various motions for preliminary injunction, Plaintiffs raise a wide range of arguments and theories. But the question before this Court—whether the district court abused its discretion in denying Plaintiffs' claims for preliminary injunctive relief—is straightforward. For multiple

independent reasons, the district court was correct to deny Plaintiffs the preliminary relief they sought.

1. First, Plaintiffs are unlikely to succeed on the merits of any of their underlying claims. The President's certification postponing records after the 25-year deadline for disclosure was lawful, as it plainly satisfied the standards set out in Section 5(g)(2)(D) of the Act. As the district court correctly concluded, Section 5(g)(2)(D) is an independent authority that authorizes the President to postpone the release of records if he certifies that certain conditions are met. That authority does not incorporate various requirements and standards that other sections of the Act impose on other postponement authorities that have been exercised during the life of the Act by the Board, the Archivist, or agencies.

Plaintiffs also erroneously contend that NARA is somehow clearly required by the Act to take on various duties that the Act imposed on the now-defunct Board. Plaintiffs identify no discrete, final agency action by NARA that is capable of review under the Administrative Procedure Act (APA). Nor have Plaintiffs identified any specific, unequivocal requirement the Act places on NARA that could form the basis of a claim to compel agency action unlawfully withheld under the APA. The Act clearly requires the Board—not the Archivist—to oversee the collection and review of assassination records. Nothing in the Act required NARA to take over those duties after the termination of the Board, and NARA has not (and could not have) unilaterally assign itself those duties by regulation or past practice.

2. The district court’s denial of Plaintiffs’ preliminary injunction motions can independently be affirmed because Plaintiffs failed to demonstrate any irreparable harm. The only irreparable harm that Plaintiffs claim—that unspecified witnesses may die during the pendency of this litigation—is inadequate. Plaintiffs fail to explain how any of the injunctive relief they seek will redress that supposed harm. Enjoining NARA from implementing the President’s memoranda or mandating that NARA conduct additional searches does not guarantee that any additional information subject to postponement will be immediately disclosed to the public, let alone that any new witnesses will be identified.

Even putting aside those defects, Plaintiffs’ “long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.” *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). The Act has been in effect for almost 30 years, and all the documents at issue have been withheld from the public for decades. Even as to the President’s postponement under Section 5(g)(2)(D), the President first invoked that authority in 2017, four years before Plaintiffs filed this lawsuit. And Plaintiffs then waited a year after filing this lawsuit to move for the preliminary relief at issue on this appeal. Those significant delays alone undercut Plaintiffs’ claim of irreparable harm.

3. Plaintiffs’ motions for preliminary injunction also fail because they have not established that the balance of harms weighs in their favor. The President determined that continuing to postpone full disclosure of a limited number of

assassination records is necessary to protect “the military defense, intelligence operations, law enforcement, or the conduct of foreign relations.” 87 Fed. Reg. at 77,968; SA12-SA14. The President made this determination after federal intelligence agencies advised him that full disclosure of the remaining records would pose a substantial threat to the intelligence operations of the United States. The President’s judgment on those matters of national security is entitled to significant deference. Plaintiffs offer essentially no response to the national security concerns that formed the basis of the President’s postponement decision. Their cursory assertion that the public interest nevertheless favors them falls far short of satisfying Plaintiffs’ burden to establish an entitlement to preliminary relief.

4. Finally, this Court does not have jurisdiction to review the district court’s dismissal order in this interlocutory posture. Plaintiffs erroneously contend that this Court can exercise pendent appellate jurisdiction to review that decision. This case does not fall within any of the narrowly construed circumstances where this Court has recognized its ability to assert pendent appellate jurisdiction over an order that otherwise would not be reviewable. Even if this Court were to conclude that it can exercise pendent jurisdiction over the district court’s dismissal order, it should affirm.

STANDARD OF REVIEW

“A preliminary injunction is an extraordinary and drastic remedy” that should “never be awarded as of right.” *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citation omitted). A plaintiff may obtain this “extraordinary remedy” only “upon a clear

showing” that it is “entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (quotation marks omitted). A district court’s decision to grant or deny a preliminary injunction is subject to “limited appellate review,” and this Court will reverse “only if the district court ‘abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.’” *National Wildlife Fed’n v. National Marine Fisheries Serv.*, 422 F.3d 782, 793 (9th Cir. 2005) (per curiam) (quoting *United States v. Peninsula Commc’ns, Inc.*, 287 F.3d 832, 839 (9th Cir. 2002)). “Mere disagreement with the district court’s conclusions is not sufficient reason for [this Court] to reverse the district court’s decision regarding a preliminary injunction.” *Id.*

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Denying Plaintiffs’ Motions for Preliminary Injunction.

The district court correctly denied Plaintiffs’ motions for preliminary relief. “A plaintiff seeking a preliminary injunction must establish that [it] is [1] likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). While this Court applies a “sliding scale” approach, such “that a stronger showing of one element may offset a weaker showing of another,” the plaintiff is still required “to make a showing on all four prongs.” *Alliance for the Wild Rockies v. Cottrell*,

632 F.3d 1127, 1131, 1135 (9th Cir. 2011). Thus, this Court should affirm if it concludes that Plaintiffs failed to make an adequate showing as to any of the prongs.

A. Plaintiffs Are Not Likely to Succeed on the Merits as to Any of the Relief They Requested

Plaintiffs appeal the denial of two different requests for injunctive relief.

Plaintiffs are unlikely to succeed on the merits as to either of those requests.

1. An Injunction Setting Aside the Biden Memoranda and Requiring NARA to Re-review Remaining Redacted Records

Plaintiffs' first request for injunctive relief is based on various claims that the presidential memoranda postponing release under Section 5(g)(2)(D) violated the requirements of the Act. Plaintiffs therefore seek an injunction "setting aside" the Biden memoranda and requiring the Archivist to re-review the remaining redacted records using the standards that Plaintiffs propose. To the extent Plaintiffs seek injunctive relief against the President, those claims fail for numerous threshold reasons. The district court dismissed all claims against the President with prejudice in a July 14 2023 order—an order that Plaintiffs do not (and cannot) challenge in this interlocutory appeal.³ *See* ER -121-125. The district court dismissed those claims for good reason: Courts generally lack authority to issue injunctive relief against "the

³ Plaintiffs appear to recognize that all claims against President Biden have been dismissed by omitting his name from the case caption. But Plaintiffs' brief is replete with assertions that seem to suggest the district court should have enjoined the President himself. *See, e.g.*, Br. 15 ("This Court has the duty to curb the President's *ultra vires* actions.").

President in the performance of his official duties.” *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir.) (per curiam) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)), *vacated on mootness grounds*, 138 S. Ct. 377 (2017). Review is unavailable where, as here, the injunction sought does not involve a “ministerial” duty and instead involves the President’s exercise of significant exercise of discretion and judgment. *See Franklin*, 505 U.S. at 802 (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498-99 (1866)). And, as the Supreme Court and this Court have made clear, the President is not an “agency” and his actions therefore are not subject to review under the APA. *See id.* at 800-01; *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 770 (9th Cir. 2018) (noting that APA review “is limited to ‘agency action,’ and the President is not an ‘agency’” (quoting 5 U.S.C. §§ 551(1), 701(b)(1))).

Construing Plaintiffs’ motion as one seeking to enjoin NARA from following the directives contained in the President’s memoranda might avoid those fatal threshold issues, but Plaintiffs are still unlikely to succeed in showing that the President’s postponement decisions were unlawful in any way. The presidential certifications issued under Section 5(g)(2)(D) of the Act clearly comply with the requirements imposed by that provision. Section 5(g)(2)(D) allows the President to postpone release past the 25-year deadline by certifying that continued postponement of records is (i) “made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations” and (ii) that

the harm identified “is of such gravity that it outweighs the public interest in disclosure.” Act § 5(g)(2)(D), 106 Stat. at 3448-49; SA5.

The President’s certifications do exactly that. Indeed, they quote the relevant statutory text nearly verbatim. The December 2022 memorandum, for example, certified “that continued postponement of public disclosure of these records is necessary to protect against an identifiable harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure,” pursuant to the statutory criteria in Section 5(g)(2)(D). 87 Fed. Reg. at 77,968; SA13. That is exactly what the Act requires.

Plaintiffs do not seriously contest that the President’s memoranda meet the express requirements set out in Section 5(g)(2)(D), nor do they second guess the President’s certification that significant risks to national security outweigh the public’s interest in immediate disclosure of the postponed records. Rather than focus on the requirements of Section 5(g)(2)(D), Plaintiffs principally focus on various requirements contained elsewhere in the Act; requirements that apply to different postponement authorities that the Act gives the President, the Archivist, agencies, or the (now-defunct) Board. *See infra* pp. 22-28. Plaintiffs attempt to import those requirements into Section 5(g)(2)(D) fail.

First, Plaintiffs’ theory has no textual basis. As the district court observed, Section 5(g)(2)(D) is an independent postponement authority that permits the

President to postpone disclosure of certain assassination records past the 25-year deadline set by the Act. *See* ER-8, 10 (January 2024 opinion). The Section sets out clear requirements and instructs the President what he must do to satisfy them. There is no indication that Congress intended to silently incorporate any additional requirements from elsewhere in the Act. Indeed, none of the other provisions Plaintiffs rely on is referenced in Section 5(g)(2)(D). That omission is illuminating given that the Act is replete with provisions that explicitly cross-reference and incorporate requirements found in other provisions. In Section 9, for example, when describing the review to be undertaken by the Board, the Act specifies that certain procedures apply to “records the public disclosure of which is postponed pursuant to section 6,” which sets out the bases an agency can rely on to postpone a record, and requires the Board to explain its determinations “including an explanation of the application of any standards contained in section 6.” Act § 9(c)(3), (4)(B), 106 Stat. at 3454-55; SA9. Section 9 similarly gives the President “sole and nondelegable authority to require the disclosure or postponement” of records that raise executive equities “under the standards set forth in section 6.” *Id.* § 9(d)(1), 106 Stat. at 3455; SA10.

Other sections of the Act follow the same tack: When Congress wanted to incorporate or reference requirements contained in other sections, it did so explicitly. *See, e.g.*, Act § 5(a)(4), 106 Stat. at 3446; SA4 (providing that records shall not be withheld or redacted “excluding names or identities consistent with the requirements

of section 6”); *id.* § 5(g)(1), 106 Stat. at 3448; SA5 (requiring periodic review “consistent with the recommendations of the Review Board under section 9(c)(3)(B)”); *id.* § 9(f)(3)(G), 106 Stat. at 3456; SA11 (requiring Board reports to include “[a]n appendix ... required under section 9(c)(3)”). Congress knew how to incorporate requirements from elsewhere in the act, and the fact that Section 5(g)(2)(D) contains no similar language strongly suggests that it should not be read to do so.

Section 5(g)(2)(D) does say that the President must “certif[y], as required by this Act, that” the two listed conditions are met. But that general reference to “this Act” cannot be read to incorporate the particular requirements the Act imposes on other postponement authorities, as Plaintiffs seem to suggest. That general reference bears no resemblance to the specific cross-references contained elsewhere in the Act. *See supra* p. 20. In addition, some requirements contained in other parts of the Act are inconsistent with the express requirements of Section 5(g)(2)(D). For example, Section 6 of the Act—which governs the agency and the Board’s initial decision to postpone a record—authorizes postponement for reasons that are not enumerated in Section 5(g)(2)(D), including the privacy interests of individuals. *See* Act § 6(2)-(4), 106 Stat. at 3449; SA6.

Thus, the general statement that the certification must be made “as required by this Act” can be read in two ways. First, it can be read a reference to the requirements contained in Section 5(g)(2)(D) itself—namely, that the president must

issue a certification that the requirements that are enumerated in subsections (i) and (ii) are met as to the records to be postponed. Second, it could be read as a reference to the fact that the Act as a whole puts a thumb on the scale in favor of disclosure, and that postponement under any provision of the Act should not be done lightly. In other words, the reference to “this Act” is clarifying that the requirements of Section 5(g)(2)(D) should be applied consistent with the Act’s pro-disclosure purpose. *See* Act § 2(a), 106 Stat. at 3443; SA2 (noting that records should bear a “presumption” of disclosure). But no matter how you read it, the general reference to “this Act” cannot, as Plaintiffs contend, be read to incorporate the myriad requirements and processes contained elsewhere in the Act. *See supra* pp. 20-21.

With that in mind, none of Plaintiffs’ myriad challenges to the President’s December 2022 certification is likely to succeed. Plaintiffs argue that the President’s certification was not made in accordance with various requirements in Section 6, including that any finding be supported by clear and convincing evidence. *See* Br. 22-25. But as discussed, Section 5(g)(2)(D)—unlike other provisions in the Act—does not reference or incorporate Section 6’s procedures or requirements. *Supra* p. 20. That different treatment confirms that Congress did not intend to silently incorporate the requirements of Section 6 into Section 5(g)(2)(D).

Plaintiffs also incorrectly contend that the Act required the President to explain the justification for postponement on a record-by-record basis. Br. 22-23. There is nothing in Section 5(g)(2)(D) that imposes any such requirement. And the fact that

other provisions of the Act *do* impose a record-by-record accounting hurt, rather than help, Plaintiffs' argument. In numerous other provisions, Congress expressly requires postponement decisions to be explained on a document-by-document basis. For example, Section 9(c)(3) requires that the Board must "create and transmit to the Archivist a report" for "each assassination record or particular information" it postpones, describing the justification for postponement. Act § 9(c)(3), 106 Stat. at 3454; SA9; *see also, e.g., id.* § 9(e), 106 Stat. at 3455-56; SA10 (requiring a notice to the public summarizing postponements approved, including the subject, originating agency, physical description of the record, and the grounds relied on for postponement). Those provisions demonstrate that, when Congress wanted to require the government to separately explain its postponement decisions for each record, it knew how to do so.

Plaintiffs next err by suggesting that the President's December 2022 postponement decision is deficient because it does not provide for any ongoing periodic review. Br. 19-22. Again, Plaintiffs' arguments are belied by the statute. Section 5(g)(2)(D) contains no reference to further periodic review after the 25-year deadline. That makes sense: Subsection (g) of Section 5 concerns "Periodic Review of Postponed Assassination Records" and requires agencies and the Archivist, not the President, to conduct periodic assessments of whether previously postponed records should continue to be postponed. Act § 5(g)(1), 106 Stat. at 3448; SA5 ("All postponed or redacted records shall be reviewed periodically by the originating agency

and the Archivist consistent with the recommendations of the Review Board under section 9(c)(3)(B).”). The 25-year deadline in Section 5(g)(2)(D) is thus intended to mark the point at which such periodic reviews would come to a close, and all assassination records would be released in full, subject to the President’s authority to further postpone release for enumerated reasons.⁴

To remedy the lack of any textual basis for their argument that the President must continue to engage in some kind of periodic review, Plaintiffs again seek to incorporate requirements from elsewhere in the Act, claiming that standards for the President’s postponement authority are outlined in Sections 6 and 9(d). Once again, Section 5(g)(2)(D) does not incorporate or even reference those sections. Nor would it make sense to: Those sections apply to postponement after an initial determination by the Board, something that has not happened in almost 30 years. For example, the periodic review process set out in Section 9(d)(2) comes into play only in the separate and long-since-passed scenario where the Board has made a formal determination concerning an agency’s initial decision to disclose or postpone disclosure—a situation far afield from the President’s December 2022 memorandum postponing disclosure.

⁴ Nor is it clear what purpose Plaintiffs think would be served by requiring further periodic review. At this point, all records are public, with the remaining postponements concerning only redactions. And the Transparency Plans provide clear, administrable standards that will determine when those redactions will be made public going forward. *See* 87 Fed. Reg. at 77,969; SA14. Given the parameters set out in the memoranda and Transparency Plans—which will, in effect, ensure a form of continued periodic review—it is unclear what plaintiffs think additional periodic review would accomplish.

See Act § 9(d)(1), 106 Stat. at 3455; SA10. Section 5(g)(2)(D) is a separate authority that does not incorporate the requirements contained in those other sections.

Contrary to Plaintiffs' claims, Br. 17-19, the December 2022 memorandum did not rely on factors "less stringent" than those enumerated in Section 5(g)(2)(D). Plaintiffs assert that "the name and identity of a living person—standing alone—is a non-statutory criterion." Br. 17.⁵ But the President did not rely on the privacy interests of individual living persons to justify postponement of any records. The President made clear that that continued postponement "is necessary to protect against identifiable harms to the military defense, intelligence operations, law enforcement, and the conduct of foreign relations that are of such gravity that they outweigh the public interest in disclosure." Certification Regarding Disclosure of Information in Certain Records Related to the Assassination of President John F. Kennedy, 88 Fed. Reg. 43,247, 43,248 (July 7, 2023); 87 Fed. Reg. at 77,968; SA13. That is exactly what the Act requires.

The President's incorporation of agency Transparency Plans does not somehow call that certification into question. First, Plaintiffs claim that some of the event-based criteria contained in those plans are somehow inconsistent with the bases listed in Section 5(g)(2)(D). Br. 16-17. Not so. Plaintiffs note, for example, that the

⁵ It bears noting that Plaintiffs acknowledge here that the requirements set out in Section 6 of the Act—which does allow for postponement based solely on privacy interests of living individuals—are not incorporated wholesale into Section 5(g)(2)(D).

Central Intelligence Agency's (CIA) Transparency Plan provides that the names of living CIA agents will be released once the individual is deceased or the individual's connection to the CIA has been officially acknowledged. Plaintiffs claim that "the name and identity of a living person—standing alone—is a non-statutory criterion." Br. 17. But of course, disclosure of the identities of hitherto-unknown CIA agents imposes obvious harms to "intelligence operations," "military defense," and "law enforcement," all of which are factors the President can consider under Section 5(g)(2)(D). There is no inconsistency between the criteria listed in the Transparency Plans and the criteria contained in Section 5(g)(2)(D).

Even if there were, the President did not rely on the Transparency Plans to satisfy Section 5(g)(2)(D)'s certification requirement—instead, those Plans were created "to ensure that information would continue to be disclosed over time as the identified harm associated with release of the information dissipates." 87 Fed. Reg. at 77,969; SA14. Once the President has made the required certification, Section 5(g)(2)(D) does not limit what factors or criteria he can consider in ensuring that postponed records will eventually be disclosed. Thus, even if there were some daylight between the criteria provided in the Transparency Plans and the initial postponement requirements contained in Section 5(g)(2)(D), Plaintiffs are still not likely to succeed on their claims.

Plaintiffs are doubly wrong to argue that NARA independently erred by "approving" the Transparency Plans. Br. 23-29. First, it is the President's

certification that effectuated further postponement past the 25-year deadline and thereby gave the Transparency Plans effect. That the Archivist reviewed those plans and provided recommendations to the President did not—and could not—somehow transfer the President’s authority under Section 5(g)(2)(D) to NARA. Furthermore, even if it informed the President’s decision, NARA’s recommendation is not a cognizable final agency action under the APA. It was the President’s certification, not NARA’s recommendation, from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quotation marks omitted). Second, as already discussed, the standards set out in the Transparency Plans are not unlawful. The President clearly certified that the Section 5(g)(2)(D) requirements were satisfied, and the fact that the Transparency Plans also take into account other factors in considering when to release documents does not call that certification into question.

Finally, the President plainly did not “rewrit[e] the definition of ‘public interest.’” Br. 13-16. To the contrary, the President expressly certified, consistent with the requirements of the Act, that postponement of some records was justified because identifiable harms outweigh the public interest in disclosure. The President further instructed agencies to “accord substantial weight to the public interest in transparency and full disclosure of any record that falls within the scope of the Act.” 87 Fed. Reg. at 77,969; SA14. Plaintiffs appear to assert that there is some disconnect between giving “substantial weight” to the public interest in reviewing documents and the “compelling” interest in prompt disclosure defined in the Act. Br. 14 (emphasis

and quotation marks omitted). But Plaintiffs do not explain what that disconnect is or why it matters. The President plainly certified that the harms he identified outweigh the public interest, and in doing so he clearly recognized that the public's interest in transparency and disclosure is significant. That is all that was required.

2. An Injunction Instructing NARA to Collect Additional Assassination Records.

Plaintiffs' second request for injunctive relief is based on claims that NARA was required to take over various duties of the Board after it disbanded in 1998. Based on that theory, Plaintiffs seek an injunction requiring NARA to conduct additional searches for assassination records and to undertake other duties of the Board before certifying under the Act that all assassination records have been made public. Plaintiffs are unlikely to succeed on the merits of those claims for several reasons.

For starters, Plaintiffs have not identified any agency action capable of review under the APA. To be reviewable under the APA, a challenged act or decision must constitute a "final agency action." 5 U.S.C. § 704. Finality requires the satisfaction of two conditions: "[f]irst, the action must mark the 'consummation' of the agency's decision[-]making process"; and "second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 177-78. A challenged action must also be "discrete"; a plaintiff cannot bring a "broad programmatic attack" on agency practices. *Norton v. Southern*

Utah Wilderness All., 542 U.S. 55, 64 (2004). And an APA claim cannot seek the “wholesale improvement of [a] program by court decree.” *Lujan v. National Wildlife Fed’n*, 497 U.S. 871, 891 (1990) (emphasis omitted).

NARA’s supposed pattern and practice of refusing to look for documents under the Act and instead suggesting that requesters seek access to documents by other means is not a discrete agency action. *See* Br. 36-40, 44. Plaintiffs acknowledge that the APA does not allow parties to seek general improvement of an agency’s practices by court order, Br. 34, but then proceed to confirm that is exactly what they are seeking here. Plaintiffs list a series of disparate actions spanning the past 25 years, including regulations (not challenged here) and various statements made by individual NARA employees, and claim these actions together show that “NARA had no coherent or methodical approach about how to address” requests from researchers. Br. 35-40. Claiming that the agency does not have a sufficiently “coherent or methodical approach” to responding to certain kinds of requests is just another way of saying Plaintiffs are seeking to challenge NARA’s general practices, not its action in any individual instance.

Unable to identify any discrete final agency action capable of review, Plaintiffs try to reframe their argument under 5 U.S.C. § 706 as a claim to compel NARA to

perform agency action that has been improperly withheld or delayed. *See* Br. 40-43.⁶ But “a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.” *Norton*, 542 U.S. at 64 (emphases omitted). The APA “does not give [courts] license to ‘compel agency action’ whenever the agency is withholding or delaying an action [courts] think it should take.” *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). Instead, a court “can compel agency action under [§ 706(1)] only if there is a specific, unequivocal command placed on the agency to take a discrete agency action, ... the agency has failed to take that action, [and] the agency action [is] pursuant to a legal obligation so clearly set forth that it could traditionally have been enforced through a writ of mandamus.” *Plaskett v. Wormuth*, 18 F.4th 1072, 1082 (9th Cir. 2021) (quotation marks omitted).

Plaintiffs have not satisfied that standard. The Act clearly requires the Board—not the Archivist—to oversee the collection and review of assassination records. *See* Act § 5(c)(1), 106 Stat. at 3447; SA4. Plaintiffs do not suggest otherwise. Instead,

⁶ Plaintiffs also appear to contend that they need not comply with the APA’s requirements because Section 11(a) of the Act somehow “override[s]” those requirements. *See* Br. 49-50. That is wrong. Section 11(a) states that “[w]hen this Act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law ... , judicial decision construing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure.” Act § 11(a), 106 Stat. at 3457, SA11. This provision could potentially come into play if another statute prohibited the disclosure of records that the Act required be disclosed. But the APA has nothing to do with the disclosure of government records. Rather, it provides a cause of action for plaintiffs who seek to challenge final agency action.

they principally argue that NARA somehow voluntarily assumed all the Board's statutory duties via regulation. Plaintiffs point to a final rule published in the Federal Register on June 27, 2000, which transferred regulations promulgated by the Board related to the Act to a different and newly-created part in Title 36 of the Code of Federal Regulations. *See* John F. Kennedy Assassination Records Collection Rules, 65 Fed. Reg. 39,550 (June 27, 2000). In conducting that bureaucratic housekeeping—which NARA characterized as a “minor technical amendment”—NARA recognized that upon “termination of the Review Board on September 30, 1998, its records were transferred to the Archivist of the United States.” *Id.* at 39,550. NARA noted that, because it “continues to maintain and supplement the collection under the provisions of the Act,” it could act as “the successor in function to this defunct independent agency” for purposes of transferring the Board's regulations to a newly created part. *Id.*; *see also* Act § 7(n), 106 Stat. at 3452; SA8 (allowing Board to promulgate interpretive regulations).

Plaintiffs take the reference to “successor in function” out of context and contend that this language effectuated a wholesale assumption by NARA of each of the duties that Congress had assigned to the Board in the Act. Br. 31-34, 50-53. The 2000 rule did no such thing. The rule's reference to the fact that NARA “continues to maintain and supplement the collection under the provisions of the Act,” 65 Fed. Reg. at 39,550, refers to the Archivists *own* duties under the Act, not the Board's duties. *See* Act § 4(d)(1), 106 Stat. at 3446; SA3 (requiring NARA to “preserve[],

protect[], archive[], and ma[k]e available” the collection of assassination records established by the Act).

More importantly, NARA could not have granted itself authorities and obligations of the Board: Were NARA to have unilaterally assumed all of the Board’s duties under the Act some 19 months after the Board itself was terminated, it would have done so contrary to the Act itself. In Section 12(a) of the Act, Congress was clear that “[t]he provisions of this Act that pertain to the appointment and operation of the [Board] shall cease to be effective when the [Board] and the terms of its members have terminated pursuant to section 7(o).” Act § 12(a), 106 Stat. at 3457; SA11. NARA would have violated Congress’s plain intentions if it had resurrected those moribund provisions of the Act that were previously assigned to the Board.

Plaintiffs fare no better by claiming that Section 12(b) of the Act somehow imposes a clear, enforceable mandate on NARA. Br. 30-32. That provision imposes no stand-alone obligation on NARA to search for assassination records elsewhere in the federal government. Instead, it simply makes clear that the other provisions of the Act continue in effect even after the Board has terminated, a proposition that NARA has never disputed. *See* Act § 12(b), 106 Stat. at 3458; SA11. Unable to identify any “specific, unequivocal command placed on the agency to take a discrete agency action,” *Plaskett*, 18 F.4th at 1082 (quotation marks omitted), Plaintiffs are not likely to succeed on their claims seeking to require NARA to conduct searches for additional assassination records.

B. Plaintiffs Have Not Demonstrated Any Irreparable Harm That Would Justify the Injunctions They Seek.

Plaintiffs' claims for injunctive relief independently fail because they have identified no irreparable harm that would justify the relief they seek. Because preliminary relief serves the "limited purpose" of "preserv[ing] the relative positions of the parties until a trial on the merits can be held," *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), a showing of irreparable injury is "[a]n essential prerequisite" to granting a preliminary injunction, *Dollar Rent A Car of Wash., Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1375 (9th Cir. 1985).

Plaintiffs do not come close to meeting their burden of "demonstrate[ing] immediate threatened injury" absent an injunction. *Boardman v. Pacific Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (emphasis omitted) (quoting *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)). The only irreparable harm that Plaintiffs claim is that unspecified "[w]itnesses in this 60-year-old case are dying every day" and that the "memories" of these witnesses "could" lead to the discovery of other "witnesses and documents." Br. 55. Plaintiffs fail to explain, however, how any of the injunctive relief they seek will redress that supposed harm. Enjoining NARA from implementing the President's memoranda or mandating that NARA conduct additional searches does not guarantee that any additional information subject to postponement will be immediately disclosed to the public, let alone that any new witnesses will be identified. Even if Plaintiffs could demonstrate that the injunctions

they seek would result in the disclosure of new witnesses, their theory further assumes, among other things, that (i) these witnesses would make themselves available to be interviewed; (ii) information learned in that interview would lead to other assassination records that are not already in NARA's possession; and (iii) absent an immediate injunction, one or more of these hypothetical witnesses will die before they can provide the hypothetical information. That kind of speculative and attenuated conjecture is insufficient to demonstrate that a preliminary injunction is necessary to prevent an irreparable harm. *See Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury does not constitute irreparable injury."). A plaintiff is required to allege more than the mere possibility of harm; they must demonstrate that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. Plaintiffs have made no such showing here.

Plaintiffs' claim of irreparable harm is inadequate for another reason: As this Court has recognized, a plaintiff's "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). Here, the Act has been in effect for almost 30 years and all the documents that the President postponed have been withheld from the public for decades. Even as to Section 5(g)(2)(D), the President first invoked that authority in 2017, four years before Plaintiffs filed this lawsuit. Then after filing this suit, Plaintiffs waited more than seven months to file their first motion for preliminary injunction, and the motions at issue in this appeal were not filed until October and

December 2023. Those significant delays are enough to “undercut [Plaintiffs’] claim of irreparable harm.” *Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015).⁷

C. The Public Interest Weighs Against an Injunction.

The district court’s denial of Plaintiffs’ motions can independently be affirmed because Plaintiffs cannot show that the public interest and the balance of harms warrant an injunction. The third and fourth requirements for issuance of a preliminary injunction—the balance of harms and public interest—“merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, those factors weigh overwhelmingly against an injunction. The President has determined that continuing to postpone full disclosure of a limited number of assassination records is necessary to protect “the military defense, intelligence operations, law enforcement, or the conduct of foreign relations.” 87 Fed. Reg. at 77,969; SA13-SA14. He has further determined that the harm from disclosure is “of such gravity that it outweighs the public interest in disclosure.” *Id.* The President made this determination after federal intelligence agencies advised him that full disclosure of the remaining records would pose a substantial threat to the intelligence operations of the United States. Congress expressly conferred on the President—and the President alone—the authority to determine whether the harm from disclosure of

⁷ Plaintiffs’ failure to demonstrate any immediate harm is also fatal to their mandamus claim. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977) (requiring, inter alia, petitioner establish that they “be damaged or prejudiced in a way not correctable on appeal”).

this information outweighs the public interest in disclosure. Act § 5(g)(2)(D), 106 Stat. at 3448-49; SA5.

As this Court has recognized, the President’s judgment on those matters of national security is entitled to significant deference: “The judiciary does not have a license to intrude into the authority, powers and functions of the executive branch, for judges are not executive officers, vested with discretion over law enforcement policy and decisions.” *United States v. Jennings*, 960 F.2d 1488, 1491 (9th Cir. 1992) (alterations and quotation marks omitted). And “when dealing with properly classified information in the national security context,” courts are “mindful of [their] limited institutional expertise on intelligence matters, as compared with the executive branch.” *Hamdan v. U.S. Dep’t of Justice*, 797 F.3d 759, 770 (9th Cir. 2015).

Plaintiffs offer essentially no response to the national security concerns that formed the basis of the President’s postponement of these records.⁸ And on public interest, Plaintiffs only quote the Act’s definition of “public interest” and claim they have “made the case” on that factor. Br. 57. That cursory assertion falls far short of satisfying Plaintiffs’ burden to establish their entitlement to the “extraordinary and drastic” remedy of a preliminary injunction. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (quoting 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and*

⁸ Plaintiffs assert that “[t]here is no fear of physical injury or institutional damage,” nor “fear of monetary loss” to NARA. Br. 57. That assertion is not responsive to the significant national security interests reflected in the President’s certification.

Procedure § 2948 (2d ed. 1995)). In any event, the public interest recognized by the Act is already fully reflected in the President’s certification. Section 5(g)(2)(D) gives due weight to the public’s compelling interest in disclosure by specifying that the President can only certify postponement if he concludes that the public interest is outweighed by identified harms. The President did so consistent with Congress’s express authorization, and Plaintiffs provide no basis to second guess that determination.

II. This Court Lacks Jurisdiction to Review the District Court’s Dismissal of Some of Plaintiffs’ Claims.

This Court does not have jurisdiction to review the district court’s orders dismissing portions of Plaintiffs’ complaint. Plaintiffs bring this appeal pursuant to 28 U.S.C. § 1292, which provides appellate jurisdiction over “[i]nterlocutory orders ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.” The district court’s order granting in part Defendants’ motion to dismiss is not an order granting or refusing to grant an injunction, nor is it an otherwise-appealable final order. *See Fletcher v. Gagosian*, 604 F.2d 637, 638 (9th Cir. 1979) (if a district court dismisses fewer than all claims in an action or fewer than all defendants, such a dismissal is not a final order appealable under 28 U.S.C. § 1291).

Plaintiffs incorrectly assert that this Court can nevertheless assert pendent appellate jurisdiction over the district court’s dismissal order. A court may exercise pendent appellate jurisdiction over rulings that do not independently qualify for

interlocutory review only if the rulings are inextricably intertwined with, or necessary to ensure meaningful review of, decisions that are properly before the court on interlocutory appeal. *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093 (9th Cir. 2007). But these requirements are strictly interpreted, setting “a very high bar” for the exercise of pendent appellate jurisdiction. *Poulos v. Caesars World Inc.*, 379 F.3d 654, 669 (9th Cir. 2004).

The court’s decision to grant in part Defendants’ motion to dismiss is not inextricably linked with the court’s decision to deny Plaintiffs’ requests for preliminary injunction. “Whether two issues are ‘inextricably intertwined’ is ‘narrowly construed.’” *Norbet v. City & County of San Francisco*, 10 F.4th 918, 937 (9th Cir. 2021) (quoting *Meredith v. Oregon*, 321 F.3d 807, 813 (9th Cir. 2003)). “Two issues are not ‘inextricably intertwined’ if we must apply different legal standards to each issue.” *Meredith*, 321 F.3d at 814 (quoting *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000)). The legal standard for evaluating a motion for preliminary injunction is distinct from the legal standard governing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See Norbet*, 10 F.4th at 937.

A preliminary injunction is an “extraordinary and drastic” equitable remedy that can be denied for failure to adequately demonstrate any of the four factors governing injunctive relief. *Munaf*, 553 U.S. at 689-90 (quoting 11A Wright & Miller, *supra*, § 2948). Only one of those factors—likelihood of success on the merits—bears any similarity to the standard for evaluating a motion to dismiss. But even that factor is

not “inextricably intertwined” with the issues raised by a motion to dismiss: Whether a plaintiff is “likely to succeed” on a claim is not the same legal question as whether a plaintiff has failed to state a claim at all. Even if those questions sometimes overlap to some extent, “the Supreme Court has made it clear that flexible interpretations of our appellate jurisdiction on the basis of concerns about judicial economy ‘drift away from the statutory instructions Congress has given to control the timing of appellate proceedings.’” *Meredith*, 321 F.3d at 815 (quoting *Swint v. Chambers Cty. Comm’n*, 514 U.S. 35, 45 (1995)). Were it otherwise, rulings on motions to dismiss for failure to state a claim would almost always merge with interlocutory appeals of preliminary injunction rulings, drastically expanding the reach of interlocutory appeals and frustrating orderly review of cases. The Supreme Court has cautioned against exactly that result, noting that § 1292(a)(1)’s grant of jurisdiction over interlocutory injunctive orders must be applied “somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders.” *Switzerland Cheese Ass’n v. E. Horne’s Mkt., Inc.*, 385 U.S. 23, 24 (1966).

Nor is resolution of the district court’s partial dismissal order necessary to ensure meaningful review of the district court’s order denying preliminary relief. The motion to dismiss was not resolved on jurisdictional or other threshold grounds that go to whether the district court had “authority to rule on [the] motion for a preliminary injunction” in the first place. *Meredith*, 321 F.3d at 816 (*Younger* abstention); *Streit v. County of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001) (qualified

immunity). The district court's dismissal order also does not present the sort of chicken-egg problem that this Court has identified in the class certification context, where "certification of a class action provides the basis for granting relief on a class-wide basis," such that "an injunction granting class-wide relief cannot be affirmed without also upholding the class certification." *Meredith*, 321 F.3d at 814; *see Paige v. California*, 102 F.3d 1035, 1039-40 (9th Cir. 1996).

Furthermore, this Court's refusal to review the dismissal order now will not prejudice Plaintiffs in any way; they will be able to seek review of the district court's dismissal rulings when a final judgment issues. Plaintiffs briefly suggest that the district court's order granting in part Defendants' motion to dismiss might have "serious, perhaps irreparable consequence." Br. 13. But they do not identify what those serious or irreparable consequences might be. To the extent Plaintiffs reference the putative irreparable harms they assert in support of their motions for injunctive relief, this Court has jurisdiction to review the district court's denial of immediate injunctive relief. Simply having to wait to challenge adverse dismissal rulings until after final judgment is not the kind of consequence that moves the needle.

III. Even If This Court Had Jurisdiction, the District Court Correctly Dismissed Plaintiffs' Claims.

If this Court were to find that it can properly exercise pendent jurisdiction over the district court's dismissal order, it should affirm dismissal. For many of the same reasons that Plaintiffs are unlikely to succeed on the merits of their claims, *see supra*

Part I.A, the district court correctly dismissed Plaintiffs' various claims about the President's authority under Section 5(g)(2)(D) and NARA's ongoing obligations under the Act. Each of those claims spring from fundamental misreadings of the Act and therefore fail as a matter of law.

CONCLUSION

For the foregoing reasons, the district court's order denying Plaintiffs' requests for injunctive relief should be affirmed.

Respectfully submitted,

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July 2024

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellees state that they know of no related case pending in this Court.

s/ Jack Starcher

Jack Starcher

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,124 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

s/ Jack Starcher

Jack Starcher

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Jack Starcher

Jack Starcher

SUPPLEMENTAL ADDENDUM

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5 U.S.C. § 704

Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706

Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Pub. L. No. 102-526, 44 U.S.C. § 2107 note

**PRESIDENT JOHN F. KENNEDY ASSASSINATION RECORDS
COLLECTION ACT OF 1992**

SECTION 1. SHORT TITLE.

This Act may be cited as the “President John F. Kennedy Assassination Records Collection Act of 1992”.

SEC. 2. FINDINGS, DECLARATIONS, AND PURPOSES.

(a) **FINDINGS AND DECLARATIONS.**—The Congress finds and declares that—

(1) all Government records related to the assassination of President John F. Kennedy should be preserved for historical and governmental purposes;

(2) all Government records concerning the assassination of President John F. Kennedy should carry a presumption of immediate disclosure, and all records should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination;

(5) legislation is necessary because the Freedom of Information Act, as implemented by the executive branch, has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy;

(6) legislation is necessary because Executive Order No. 12356, entitled “National Security Information” has eliminated the declassification and downgrading schedules relating to classified information across government and has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy; and

(7) most of the records related to the assassination of President John F. Kennedy are almost 30 years old, and only in the rarest cases is there any legitimate need for continued protection of such records.

(b) **PURPOSES.**—The purposes of this Act are—

(1) to provide for the creation of the President John F. Kennedy Assassination Records Collection at the National Archives and Records Administration; and

(2) to require the expeditious public transmission to the Archivist and public disclosure of such records.

SEC. 3. DEFINITIONS.

In this Act:

(10) “Public interest” means the compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history surrounding the assassination of President John F. Kennedy.

SEC. 4. PRESIDENT JOHN F. KENNEDY ASSASSINATION RECORDS COLLECTION AT THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION.

(a) IN GENERAL.—(1) Not later than 60 days after the date of enactment of this Act, the National Archives and Records Administration shall commence establishment of a collection of records to be known as the President John F. Kennedy Assassination Records Collection. In so doing, the Archivist shall ensure the physical integrity and original provenance of all records. The Collection shall consist of record copies of all Government records relating to the assassination of President John F. Kennedy, which shall be transmitted to the National Archives in accordance with section 2107 of title 44, United States Code. The Archivist shall prepare and publish a subject guidebook and index to the collection.

(b) DISCLOSURE OF RECORDS.—All assassination records transmitted to the National Archives for disclosure to the public shall be included in the Collection and shall be available to the public for inspection and copying at the National Archives within 30 days after their transmission to the National Archives.

(d) ADDITIONAL REQUIREMENTS.—(1) The Collection shall be preserved, protected, archived, and made available to the public at the National Archives using appropriations authorized, specified, and restricted for use under the terms of this Act.

(2) The National Archives, in consultation with the Information Security Oversight Office, shall ensure the security of the postponed assassination records in the Collection.

SEC. 5. REVIEW, IDENTIFICATION, TRANSMISSION TO THE NATIONAL ARCHIVES, AND PUBLIC DISCLOSURE OF ASSASSINATION RECORDS BY GOVERNMENT OFFICES.

(a) IN GENERAL.—(1) As soon as practicable after the date of enactment of this Act, each Government office shall identify and organize its records relating to the assassination of President John F. Kennedy and prepare them for transmission to the Archivist for inclusion in the Collection.

(4) No assassination record created by a person or entity outside government (excluding names or identities consistent with the requirements of section 6) shall be withheld, redacted, postponed for public disclosure, or reclassified.

(c) REVIEW.—(1) Not later than 300 days after the date of enactment of this Act, each Government office shall review, identify and organize each assassination record in its custody or possession for disclosure to the public, review by the Review Board, and transmission to the Archivist.

(2) In carrying out paragraph (1), a Government office shall—

(A) determine which of its records are assassination records;

(D)(i) determine whether its assassination records or particular information in assassination records are covered by the standards for postponement of public disclosure under this Act; and

(ii) specify on the identification aid required by subsection (d) the applicable postponement provision contained in section 6;

(E) organize and make available to the Review Board all assassination records identified under subparagraph (D) the public disclosure of which in whole or in part may be postponed under this Act;

(F) organize and make available to the Review Board any record concerning which the office has any uncertainty as to whether the record is an assassination record governed by this Act;

(e) TRANSMISSION TO THE NATIONAL ARCHIVES.—Each Government office shall—

(1) transmit to the Archivist, and make immediately available to the public, all assassination records that can be publicly disclosed, including those that are publicly available on the date of enactment of this Act, without any redaction, adjustment, or withholding under the standards of this Act; and

(2) transmit to the Archivist upon approval for postponement by the Review Board or upon completion of other action authorized by this Act, all assassination records the public disclosure of which has been postponed, in whole or in part, under the standards of this Act, to become part of the protected Collection.

(f) CUSTODY OF POSTPONED ASSASSINATION RECORDS.—An assassination record the public disclosure of which has been postponed shall, pending transmission to the Archivist, be held for reasons of security and preservation by the originating body until such time as the information security program has been established at the National Archives as required in section 4(e)(2).

(g) PERIODIC REVIEW OF POSTPONED ASSASSINATION RECORDS.—

(1) All postponed or redacted records shall be reviewed periodically by the originating agency and the Archivist consistent with the recommendations of the Review Board under section 9(c)(3)(B).

(2)(A) A periodic review shall address the public disclosure of additional assassination records in the Collection under the standards of this Act.

(B) All postponed assassination records determined to require continued postponement shall require an unclassified written description of the reason for such continued postponement. Such description shall be provided to the Archivist and published in the Federal Register upon determination.

(C) The periodic review of postponed assassination records shall serve to downgrade and declassify security classified information.

(D) Each assassination record shall be publicly disclosed in full, and available in the Collection no later than the date that is 25 years after the date of enactment of this Act, unless the President certifies, as required by this Act, that—

(i) continued postponement is made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations; and

(ii) the identifiable harm is of such gravity that it outweighs the public interest in disclosure.

SEC. 6. GROUNDS FOR POSTPONEMENT OF PUBLIC DISCLOSURE OF RECORDS.

Disclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of this Act if there is clear and convincing evidence that—

(1) the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination is of such gravity that it outweighs the public interest, and such public disclosure would reveal—

(A) an intelligence agent whose identity currently requires protection;

(B) an intelligence source or method which is currently utilized, or reasonably expected to be utilized, by the United States Government and which has not been officially disclosed, the disclosure of which would interfere with the conduct of intelligence activities; or

(C) any other matter currently relating to the military defense, intelligence operations or conduct of foreign relations of the United States, the disclosure of which would demonstrably impair the national security of the United States;

(2) the public disclosure of the assassination record would reveal the name or identity of a living person who provided confidential information to the United States and would pose a substantial risk of harm to that person;

(3) the public disclosure of the assassination record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that it outweighs the public interest;

(4) the public disclosure of the assassination record would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or a foreign government, and public disclosure would be so harmful that it outweighs the public interest; or

(5) the public disclosure of the assassination record would reveal a security or protective procedure currently utilized, or reasonably expected to be utilized, by the Secret Service or another Government agency responsible for protecting Government officials, and public disclosure would be so harmful that it outweighs the public interest.

SEC. 7. ESTABLISHMENT AND POWERS OF THE ASSASSINATION RECORDS REVIEW BOARD.

(a) ESTABLISHMENT.—There is established as an independent agency a board to be known as the Assassinations Records Review Board.

(b) APPOINTMENT.—(1) The President, by and with the advice and consent of the Senate, shall appoint, without regard to political affiliation, 5 citizens to serve as members of the Review Board to ensure and facilitate the review, transmission to the Archivist, and public disclosure of Government records related to the assassination of President John F. Kennedy.

(2) The President shall make nominations to the Review Board not later than 90 calendar days after the date of enactment of this Act.

(i) DUTIES OF THE REVIEW BOARD.—(1) The Review Board shall consider and render decisions on a determination by a Government office to seek to postpone the disclosure of assassination records.

(2) In carrying out paragraph (1), the Review Board shall consider and render decisions—

(A) whether a record constitutes an assassination record; and

(B) whether an assassination record or particular information in a record qualifies for postponement of disclosure under this Act.

(j) POWERS.—(1) The Review Board shall have the authority to act in a manner prescribed under this Act including authority to—

(A) direct Government offices to complete identification aids and organize assassination records;

(B) direct Government offices to transmit to the Archivist assassination records as required under this Act, including segregable portions of assassination records, and substitutes and summaries of assassination records that can be publicly disclosed to the fullest extent;

(C)(i) obtain access to assassination records that have been identified and organized by a Government office;

(ii) direct a Government office to make available to the Review Board, and if necessary investigate the facts surrounding, additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act; and

(iii) request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under this Act;

(n) INTERPRETIVE REGULATIONS.—The Review Board may issue interpretive regulations.

(o) TERMINATION AND WINDING UP.—(1) The Review Board and the terms of its members shall terminate not later than 2 years after the date of enactment of this Act, except that the Review Board may, by majority vote, extend its term for an additional 1–year period if it has not completed its work within that 2–year period.

(2) Upon its termination, the Review Board shall submit reports to the President and the Congress including a complete and accurate accounting of expenditures during its existence, and shall complete all other reporting requirements under this Act.

(3) Upon termination and winding up, the Review Board shall transfer all of its records to the Archivist for inclusion in the Collection, and no record of the Review Board shall be destroyed.

SEC. 9. REVIEW OF RECORDS BY THE ASSASSINATION RECORDS REVIEW BOARD.

(b) STARTUP REQUIREMENTS.—The Review Board shall—

(1) not later than 90 days after the date of its appointment, publish a schedule for review of all assassination records in the Federal Register; and

(2) not later than 180 days after the date of enactment of this Act, begin its review of assassination records under this Act.

(c) DETERMINATIONS OF THE REVIEW BOARD.—(1) The Review Board shall direct that all assassination records be transmitted to the Archivist and disclosed to the public in the Collection in the absence of clear and convincing evidence that—

(A) a Government record is not an assassination record; or

(B) a Government record or particular information within an assassination record qualifies for postponement of public disclosure under this Act.

(2) In approving postponement of public disclosure of an assassination record, the Review Board shall seek to—

(A) provide for the disclosure of segregable parts, substitutes, or summaries of such a record; and

(B) determine, in consultation with the originating body and consistent with the standards for postponement under this Act, which of the following alternative forms of disclosure shall be made by the originating body:

(i) Any reasonably segregable particular information in an assassination record.

(ii) A substitute record for that information which is postponed.

(iii) A summary of an assassination record.

(3) With respect to each assassination record or particular information in assassination records the public disclosure of which is postponed pursuant to section 6, or for which only substitutions or summaries have been disclosed to the public, the Review Board shall create and transmit to the Archivist a report containing—

(A) a description of actions by the Review Board, the originating body, the President, or any Government office (including a justification of any such action to postpone disclosure of any record or part of any record) and of any official proceedings conducted by the Review Board with regard to specific assassination records; and

(B) a statement, based on a review of the proceedings and in conformity with the decisions reflected therein, designating a recommended specified time at which or a specified occurrence following which the material may be appropriately disclosed to the public under this Act.

(4)(A) Following its review and a determination that an assassination record shall be publicly disclosed in the Collection or postponed for disclosure and held in the protected Collection, the Review Board shall notify the head of the originating body of its determination and publish a copy of the determination in the Federal Register within 14 days after the determination is made.

(B) Contemporaneous notice shall be made to the President for Review Board determinations regarding executive branch assassination records, and to the oversight committees designated in this Act in the case of legislative branch records. Such notice shall contain a written unclassified justification for public disclosure or postponement of disclosure, including an explanation of the application of any standards contained in section 6.

(d) PRESIDENTIAL AUTHORITY OVER REVIEW BOARD DETERMINATION.—

(1) PUBLIC DISCLOSURE OR POSTPONEMENT OF DISCLOSURE.—After the Review Board has made a formal determination concerning the public disclosure or postponement of disclosure of an executive branch assassination record or information within such a record, or of any information contained in an assassination record, obtained or developed solely within the executive branch, the President shall have the sole and nondelegable authority to require the disclosure or postponement of such record or information under the standards set forth in section 6, and the President shall provide the Review Board with an unclassified written certification specifying the President's decision within 30 days after the Review Board's determination and notice to the executive branch agency as required under this Act, stating the justification for the President's decision, including the applicable grounds for postponement under section 6, accompanied by a copy of the identification aid required under section 4.

(2) PERIODIC REVIEW.—Any executive branch assassination record postponed by the President shall be subject to the requirements of periodic review, downgrading and declassification of classified information, and public disclosure in the collection set forth in section 4.

(3) RECORD OF PRESIDENTIAL POSTPONEMENT.—The Review Board shall, upon its receipt, publish in the Federal Register a copy of any unclassified written certification, statement, and other materials transmitted by or on behalf of the President with regard to postponement of assassination records.

(e) NOTICE TO PUBLIC.—Every 30 calendar days, beginning on the date that is 60 calendar days after the date on which the Review Board first approves the postponement of disclosure of an assassination record, the Review Board shall publish in the Federal Register a notice that summarizes the postponements approved by the Review Board or initiated by the President, the House of Representatives, or the Senate, including a description of the subject, originating agency, length or other physical description, and each ground for postponement that is relied upon.

(f) REPORTS BY THE REVIEW BOARD.—(1) The Review Board shall report its activities to the leadership of the Congress, the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, the President, the Archivist, and the head of any Government office whose records have been the subject of Review Board activity.

(2) The first report shall be issued on the date that is 1 year after the date of enactment of this Act, and subsequent reports every 12 months thereafter until termination of the Review Board.

- (3) A report under paragraph (1) shall include the following information:
- (A) A financial report of the expenses for all official activities and requirements of the Review Board and its personnel.
 - (B) The progress made on review, transmission to the Archivist, and public disclosure of assassination records.
 - (C) The estimated time and volume of assassination records involved in the completion of the Review Board's performance under this Act.
 - (D) Any special problems, including requests and the level of cooperation of Government offices, with regard to the ability of the Review Board to operate as required by this Act.
 - (E) A record of review activities, including a record of postponement decisions by the Review Board or other related actions authorized by this Act, and a record of the volume of records reviewed and postponed.
 - (F) Suggestions and requests to Congress for additional legislative authority needs.
 - (G) An appendix containing copies of reports of postponed records to the Archivist required under section 9(c)(3) made since the date of the preceding report under this subsection.

SEC. 11. RULES OF CONSTRUCTION.

(a) **PRECEDENCE OVER OTHER LAW.**—When this Act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law (except section 6103 of the Internal Revenue Code), judicial decision construing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure, with the exception of deeds governing access to or transfer or release of gifts and donations of records to the United States Government.

SEC. 12. TERMINATION OF EFFECT OF ACT.

(a) **PROVISIONS PERTAINING TO THE REVIEW BOARD.**—The provisions of this Act that pertain to the appointment and operation of the Review Board shall cease to be effective when the Review Board and the terms of its members have terminated pursuant to section 7(o).

(b) **OTHER PROVISIONS.**—The remaining provisions of this Act shall continue in effect until such time as the Archivist certifies to the President and the Congress that

all assassination records have been made available to the public in accordance with this Act.

87 Fed. Reg. 77,967 (Dec. 15, 2022) - Certifications Regarding Disclosure of Information in Certain Records Related to the Assassination of President John F. Kennedy

Section 1. Policy. As set forth in the Presidential Memorandum of October 22, 2021 (Temporary Certification Regarding Disclosure of Information in Certain Records Related to the Assassination of President John F. Kennedy) (2021 Memorandum), in the President John F. Kennedy Assassination Records Collection Act of 1992 (44 U.S.C. 2107 note) (the “Act”), the Congress declared that “all Government records concerning the assassination of President John F. Kennedy . . . should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination.” The Congress also found that “most of the records related to the assassination of President John F. Kennedy are almost 30 years old, and only in the rarest cases is there any legitimate need for continued protection of such records.” In the 30 years since the Act became law, the profound national tragedy of President Kennedy's assassination continues to resonate in American history and in the memories of so many Americans who were alive on that terrible day; meanwhile, the need to protect records concerning the assassination has weakened with the passage of time. It is therefore critical to ensure that the United States Government maximizes transparency by disclosing all information in records concerning the assassination, except when the strongest possible reasons counsel otherwise.

Sec. 2. Background. (a) The Act permits the continued postponement of disclosure of information in records concerning President Kennedy's assassination only when postponement remains necessary to protect against an identifiable harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure. ***

(b) Pursuant to my direction, agencies have undertaken a comprehensive effort to review the full set of almost 16,000 records that had previously been released in redacted form and determined that more than 70 percent of those records may now be released in full. This significant disclosure reflects my Administration's commitment to transparency and will provide the American public with greater insight and understanding of the Government's investigation into this tragic event in American history.

(c) In the course of their review, agencies have identified a limited number of records containing information for continued postponement of public disclosure. NARA has reviewed these proposed redactions and has coordinated with relevant consulting

agencies, where appropriate, to ensure that the proposed redactions meet the statutory standard for continued postponement. The Acting Archivist has recommended certifying a small subset of the reviewed records for continued postponement of public disclosure.

(d) The Acting Archivist has further indicated that additional work remains to be done with respect to a limited number of other reviewed records that were the subject of agency proposals for continued postponement of public disclosure. The Acting Archivist believes such additional work could further reduce the amount of redacted information. The Acting Archivist therefore recommends that I temporarily certify the continued postponement of public disclosure of the redacted information in these records to provide additional time for review and to ensure that information from these records is disclosed to the maximum extent possible, consistent with the standards of the Act.

Sec. 3. Certification. In light of the proposals from agencies for continued postponement of public disclosure of information in the records identified in section 2(c) of this memorandum under the statutory standard, and the Acting Archivist's recommendation, I agree that continued postponement of public disclosure of such information is warranted to protect against an identifiable harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure. Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, including section 5(g)(2)(D) of the Act, I hereby certify that continued postponement of public disclosure of these records is necessary to protect against an identifiable harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure. All information within these records that agencies have proposed for continued postponement under section 5(g)(2)(D) of the Act shall accordingly be withheld from public disclosure. Further release of the information in these records shall occur in a manner consistent with the Transparency Plans described in section 7 of this memorandum.

Sec. 5. Release. Any information currently withheld from public disclosure that agencies have not proposed for continued postponement shall be released to the public by December 15, 2022.

Sec. 6. Review. (a) From the date of this memorandum until May 1, 2023, relevant agencies and NARA shall jointly review the remaining redactions in the records addressed in sections 2(d) and 4 of this memorandum with a view to maximizing transparency and disclosing all information in records concerning the assassination,

except when the strongest possible reasons counsel otherwise. Any information that agencies propose for continued postponement of public release beyond June 30, 2023, shall be limited to the absolute minimum under the statutory standard. Agencies shall not propose to continue redacting information unless the redaction is necessary to protect against an identifiable harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure. In applying the statutory standard, agencies shall:

- (i) accord substantial weight to the public interest in transparency and full disclosure of any record that falls within the scope of the Act; and
- (ii) give due consideration that some degree of harm is not grounds for continued postponement unless the degree of harm is of such gravity that it outweighs the public interest in disclosure.

Sec. 7. Transparency Plans. As part of their review, each agency prepared a plan for the eventual release of information (Transparency Plan) to ensure that information would continue to be disclosed over time as the identified harm associated with release of the information dissipates. Each Transparency Plan details the event-based or circumstance-based conditions that will trigger the public disclosure of currently postponed information by the National Declassification Center (NDC) at NARA. These Transparency Plans have been reviewed by NARA, and the Acting Archivist has advised that use of the Transparency Plans by the NDC will ensure appropriate continued release of information covered by the Act. Accordingly, I direct that the Transparency Plans submitted by agencies be used by the NDC to conduct future reviews of any information that has been postponed from public disclosure, including information in the records described in sections 2(c) and 3 of this memorandum.